

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS	1
SUMMARY	11
I THE COMMISSION SHOULD CLARIFY, OR IF NECESSARY RECONSIDER, TO MAKE CLEAR THAT THE OBLIGATION TO PAY COMPENSATION FOR CALLS ROUTED TO A SBR REMAINS WITH THE INTERMEDIATE CARRIER UNTIL THE SBR HAS COMPLIED WITH CERTIFICATION AND AUDIT REQUIREMENTS	1
A The SBR-Pays Plan Initially Proposed By MCI Appears Viable	3
B A SBR-Pays Plan That Makes SBRs The Default Payers Is Not Viable	4
C A Rule In Which The Payment Obligation Defaults To The SBR Would Preclude Collection Of A Substantial Portion Of The Compensation Owed, Contrary To Section 276	6
1 Litigation Is The PSPs' Only Weapon	9
2 Wide-scale Litigation Against Small SBRs Is Simply Impractical	9
D The Annual System Audit Must Be A True "Pre-Condition" Of Payment	11
E A Default-to-Intermediate-Carrier Rule Is Consistent With The Statute And Case Law	13
F The Rules Should Ensure Continuity Of Payment If A SBR Fails To Maintain Its Tracking And Payment System	17
II ADDITIONAL ISSUES	18
A Verification Data Must Be Kept For At Least 27 Months.	19
B Carriers Must Be Required To Report Uncompleted Calls	20
C Call Duration Data Must Be Reported.	21
D There Must Be A Uniform Reporting Format.	22
E The <i>Order</i> Should Explicitly Define When Calls Are "Completed" To Carriers	22
F The Commission Should Clarify The Payment Obligations Of LECs	23
CONCLUSION	24

SUMMARY

Under the final rules adopted by the Commission in the report and order released October 3, 2003, SBRs must obtain an audit of their tracking systems and submit a "System Audit Report" as a "precondition" to tendering compensation payments to payphone service providers ("PSPs"). *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, FCC 03-235 (rel. October 3, 2003) ("Order"), App. C, amending 47 CFR §64.1320(a). If the SBR does *not* establish a call tracking system and obtain the necessary system audit, however, it is not clear whether the SBR or its facilities-based "Intermediate Carrier" has the "default" responsibility to pay compensation to the PSP. The language of the rule indicates that the SBR itself cannot tender payment without first filing an audit report, but there is language in the order indicating that the payment obligation falls on the SBR unless all affected parties consent to alternative arrangements.

The Commission should clarify that, as initially proposed by MCI, the Intermediate Carrier retains payment responsibility unless and until the SBR files the required System Audit Report. Only a rule based on that principle has a chance to ensure that all parties know where payment responsibility lies and that PSPs will receive fair compensation for every call. The alternative SBR-pays rule, in which the payment obligation falls on and remains with the SBR whether or not the SBR complies with the system audit requirement, guarantees that there will be wide confusion over responsibility for payment and substantial non-compliance by SBRs, resulting in major compensation shortfalls. The record in this proceeding clearly establishes that there are large numbers of SBRs that simply lack the means or motivation to maintain a payphone call tracking and payment system and that most SBRs will avoid compliance unless forced to do so by threat of litigation. The record also establishes that litigation

against non-SBRs is generally impractical because individual amounts owed are too small to justify the high costs of litigating payphone compensation cases. In any event, a rule that relies on extensive litigation against SBRs in order to achieve its purpose simply does not provide the necessary assurance of compensation required by Section 276

By contrast, a rule under which compensation responsibility defaults to the Intermediate Carrier would be fair to all parties and could have a reasonable chance of ensuring fair compensation for each and every call. Such a rule is also consistent with the statute and applicable case law. The Commission should clarify, or if necessary modify its order to make clear that, where a SBR does not file a System Audit Report, compensation payment responsibility remains with the Intermediate Carrier. To ensure that there is continuity of payment in the event that a SBR exits the market or fails to maintain its tracking system, the Commission should amend its rules to provide that SBRs' payment responsibility is subject to annual renewal, and to require carriers to file annual Audit Renewal Reports so that all parties know whether payment responsibility remains with the SBR or has shifted back to the Intermediate Carrier.

In addition to the overarching default-payer issue, the Commission should reconsider or clarify a number of other aspects of the order. Specifically, the Commission should (1) require carriers to maintain payment verification data for 27 months, rather than 18, (2) require carriers to report and maintain data on uncompleted calls as well as completed calls, (3) require carriers to preserve and permit PSP access to data showing the duration of calls, (4) require carriers to follow a uniform reporting format, (5) clarify that calls made to carriers for purposes other than attempting to place

a further call are completed calls; and (6) clarify the payment obligations of local exchange carriers

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

_____)	
In the Matter of)	
)	
Implementation of the Pay Telephone)	CC Docket No. 96-128
Reclassification and Compensation)	
Provisions of the Telecommunications)	File No. NSD-L-99-34
Act of 1996)	
_____)	

**PETITION OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
FOR CLARIFICATION OR PARTIAL RECONSIDERATION**

The American Public Communications Council ("APCC") hereby petitions for clarification or partial reconsideration of the Commission's report and order in the above-captioned docket, released on October 3, 2003, and published in the Federal Register on November 6, 2003. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, FCC 03-235 (rel. October 3, 2003) ("Order"). See 68 FR 62751 (2003)

**I. THE COMMISSION SHOULD CLARIFY, OR IF NECESSARY
RECONSIDER, TO MAKE CLEAR THAT THE OBLIGATION TO PAY
COMPENSATION FOR CALLS ROUTED TO A SBR REMAINS WITH
THE INTERMEDIATE CARRIER UNTIL THE SBR HAS COMPLIED
WITH CERTIFICATION AND AUDIT REQUIREMENTS**

The compensation rule amendments adopted in the *Order* were evidently based largely on a proposal by MCI. Under MCI's proposal, the obligation to pay compensation for calls routed to a switched-based reseller ("SBR") would remain with the Intermediate Carrier unless the SBR has complied with certification and audit

requirements. See Comments of WorldCom at 27-29; MCI Ex Parte, filed August 19, 2003, entitled "Third Party Verification Procedures as a Condition for SBR Compensation of Payphone Service Providers," at 5, 20. The Commission clearly modeled many aspects of its amended compensation scheme on MCI's proposal.

There are some clear indications that the FCC intended to adopt the provision of MCI's proposal that precludes SBRs from taking over compensation payment responsibility from Intermediate Carriers until the SBR complies with the system audit requirement. For example, Section 64.1320(a) of the amended rules states that "[a]s a *precondition* to tendering payment pursuant to section 64.1310(a), all Completing Carriers must undergo a system audit . . ." *Order*, App. C. This approach appears viable. In the *Order*, however, there is other language indicating that the "default" payer is the SBR, and that the SBR cannot relieve itself of that responsibility without the agreement of both the SBR's Intermediate Carrier(s) and the affected PSPs. *Order*, ¶¶ 48 & nn.136-37. This passage would indicate that the plan actually adopted by the Commission left out the critical requirement that SBRs submit system audits prior to assuming responsibility for paying compensation. If that is the correct interpretation of the *Order*, then much of the value of the plan is lost.

If, as APCC believes, the Commission did intend to make the system audit a "precondition" to SBRs assuming direct payment responsibility, APCC requests that the Commission issue an appropriate clarification. If the Commission did not so intend, then the Commission should reconsider and amend its rules to explicitly provide that where the SBR has not filed a System Audit Report, the Intermediate Carrier is responsible for paying compensation.

A. The SBR-Pays Plan Initially Proposed By MCI Appears Viable

The plan initially proposed by MCI seems relatively straightforward in its implementation¹. Under the MCI plan, an SBR that wants to assume direct payment responsibility could do so by investing in call tracking capability, obtaining the necessary system audit, and providing an audit report to the FCC and the PSPs. An SBR that does not want to assume direct payment responsibility would simply omit submitting a system audit. If an SBR does not make the affirmative effort to establish and qualify a tracking/payment system, then the compensation rule “defaults” to an Intermediate-Carrier-pays requirement.² Thus, the “default” situation leaves payment responsibility in the hands of a carrier that has a tracking/payment system in place.

The MCI plan could work because it may provide reasonable assurance that PSPs will be compensated for “each and every . . . call” even if the SBR completing the calls does nothing to comply with the compensation rules. In that case, compensation responsibility automatically reverts to the Intermediate Carrier.³

Moreover, there would be a high degree of certainty as to the identity of the direct payer. All parties would know which SBRs were required to make direct compensation payments because only those SBRs that notified Intermediate Carriers

¹ Even if the plan described in the text following this note is not what MCI intended to propose, it is the only plan that can possibly make an SBR-pays scheme workable and should have been adopted.

² “SBRs who have not been verified to be able to provide data in a timely fashion should not be allowed to directly compensate PSPs.” Comments of WorldCom at 28.

³ Where there is a “chain” of multiple IXCs involved in a call, the payment requirement would default to the first IXC if all other IXCs in the chain did not submit system audit reports.

and PSPs that they had completed the necessary system audit would have the responsibility to make direct payments

B. A SBR-Pays Plan That Makes SBRs The Default Payers Is Not Viable

The plan indicated by Paragraph 48 of the *Order*, however, is neither straightforward nor viable. Under that approach, SBRs alone would be responsible for direct payment of compensation for calls completed by SBRs, regardless of whether the SBR has undergone the required system audit⁴. In other words, *even if the SBR has not established any tracking/payment system*

Such a plan would deprive PSPs of the statutorily required assurance of compensation with respect to a large percentage of dial-around calls. As discussed further below, the record in this proceeding establishes that an SBR-pays rule forces PSPs to rely on litigation as their primary means of collecting compensation – one of the very difficulties the Commission set out to resolve in adopting the *Second Order on Reconsideration* – and that litigation is simply too costly to provide an effective collection mechanism, especially when the non-paying carrier is too small to justify the PSPs' cost of instituting proceedings.

More fundamentally, Section 276 of the Act does not direct the Commission to ensure that PSPs merely have an opportunity to file collection lawsuits. Section 276

⁴ Payment responsibility would shift to the Intermediate Carrier *only* if an alternative arrangement is agreed to by "the relevant parties." *Order*, ¶ 48. Thus, the Intermediate Carrier(s) must agree to take on payment responsibility *and* the SBR must obtain agreements to that effect from all the affected PSPs. Although, in theory, a SBR could secure agreements with some PSPs to make the Intermediate Carrier the payer, while continuing to make direct payments to PSPs that did not agree, in practice it is hard to imagine that any SBR or Intermediate Carrier would accept such a bifurcated approach to compensation payment.

directs the Commission to “ensure that [PSPs] are fairly compensated for each and every . call ” 47 U.S. C. § 276(b)(1)(A) Placing payment responsibility on carriers who must be sued before they will pay does not comply with that statutory directive.

The problems with a SBR-pays-by-default plan would be compounded because there remains significant ambiguity in the rules regarding who is and is not a “SBR” or “Completing Carrier.” The fact that an Intermediate Carrier has identified one of its customers as a SBR does not mean that that customer will accept responsibility to pay dial-around compensation to the PSP. See APCC Reply Comments, Exh. 1, Declaration of Allan C Hubbard, ¶¶ 6-8 (“Hubbard Dec.”).⁵ Under the old SBR-pays rule, PSPs had a great deal of difficulty in distinguishing switch-based from “switchless” resellers. Under the FCC’s reformulation of the SBR-pays rule, the same sort of confusion would be generated anew.

Under a SBR-pays-by-default rule, the SBR would be *required* to pay compensation *even if* it has not *qualified* to do so by establishing a tracking/payment system, completing a system audit and by providing evidence of its qualifications to Intermediate Carriers and PSPs. As a result, there will reemerge the familiar scenario whereby (1) the Intermediate Carrier identifies certain customers as SBRs, and does not

⁵ Unlike Intermediate Carriers, PSPs have no pre-established customer relationships with SBRs, and therefore no guarantee that the entity they are dealing with is, in fact, the entity liable to pay them. Companies targeted by PSPs for collection of DAC under the old SBR-pays rule frequently could not be located, or if located, frequently claimed that they were not liable to pay compensation because they were not SBRs. See Hubbard Dec., ¶¶ 6-8.

pay compensation on calls routed to those customers,⁶ and (2) those same customers identify *themselves* as non-SBRs, and therefore do not submit any system audit report or pay any compensation to PSPs

By contrast, if payment responsibility defaults to the Intermediate Carrier, there would be no disconnect between the views of the Intermediate Carrier and the SBR as to who is responsible for direct payment of compensation. The Intermediate Carrier would be required to pay compensation to PSPs unless the SBR has timely notified the carrier that it has completed a system audit and provided the Intermediate Carrier a copy of the system audit report required by the rules. SBRs that do not submit system audit reports *would neither* be required to pay compensation *nor* be qualified to do so, and those that do submit system audit reports *would* be required *and* qualified to pay compensation

C. A Rule In Which The Payment Obligation Defaults To The SBR Would Preclude Collection Of A Substantial Portion Of The Compensation Owed, Contrary To Section 276

By failing to provide a mechanism for ensuring payment to PSPs in the “default” situation, a SBR-pays-by-default rule would contravene the requirements of Section 276. The record of this proceeding clearly establishes that there are hundreds of small SBRs who find it too costly to implement call tracking/payment systems, and that under the previous SBR-pays plan, a large portion of these small SBRs simply disregarded the FCC’s compensation rules. Indeed, it is such SBRs, many of whom are too small for

⁶ It is in the Intermediate Carrier's self-interest to simply assume that all of its customers whose identity is at all ambiguous are switch-based resellers, thereby shifting compensation payment responsibility to the customers.

PSPs to justify the costs of collection litigation, who posed the biggest problems for PSPs under the old SBR-pays rules. *See generally* APCC Comments, Exh 2, Declaration of Ruth Jaeger, ¶¶ 11-24, 34 (“Jaeger Dec.”). Under a SBR-pays-by-default rule, PSPs once again would have to engage in a largely fruitless chase after these hundreds of SBRs.

No legitimate purpose is served by placing direct payment obligations on SBRs who are unable or unwilling to establish effective tracking and payment systems. Yet, a SBR-pays-by-default rule would do exactly that. As a practical matter, regardless of how many SBRs are ultimately “brought to justice,” the SBR-pays-by-default rule would guarantee that, once again, a large portion of the compensation owed to PSPs will not be paid, imposing major losses and costs on PSPs and their customers and ignoring the directives of Section 276 to ensure compensation for “each and every” call and to promote “widespread deployment” of payphones. 47 CFR §§ 276(b), (b)(1)(A).

The record in this proceeding amply demonstrates that there are large numbers of SBRs that simply lack the means or motivation to maintain a payphone tracking and compensation system. SBRs themselves have acknowledged that they are ill equipped to undertake the tracking of payphone calls and the direct payment of payphone compensation. *ASCENT et al.* Comments at 4. Even under the current rules, which require SBRs only to provide information on call completion to Intermediate Carriers, most SBRs have shown themselves to be woefully inadequate when it comes to tracking calls.

AT&T, with few exceptions, has been unable to collect adequate call completion data from SBRs to calculate remittances to PSPs.

AT&T Comments at 15.

Many smaller SBRs have simply failed to implement [the] longstanding requirement [to accurately track completed payphone calls.]

WorldCom Comments at 14.

88% of MCI's SBRs either do not have call tracking systems in place, or have systems in place that fail to consistently provide [accurate call] completion data in a timely manner

Id. at 25. Qwest states that 328 of its 355 SBR customers, or more than 92%, have failed to participate in Qwest's completed call true-up process. Qwest Comments at 8. Further, these numbers are conservative estimates with respect to the FCC's new regime. Since it is clearly far more difficult for a SBR to accurately track payphone calls and pay compensation for 2,000 PSPs than to provide call completion information to one's supplier regarding supplier-identified payphone calls, even more SBRs would be likely to prove unable or unwilling to achieve the level of call tracking and payment processes necessary to satisfy the audit requirements of the reformulated SBR-pays rule.

This conclusion is supported by PSPs' experience under the pre-November 23, 2001 rule. As noted in APCC's previously filed comments, most SBRs that PSPs had to deal with under the old SBR-pays rule (and that PSPs must continue to deal with to clean up outstanding liabilities under the *First Reconsideration Order*) avoided any compliance until forced to do so by litigation or the threat thereof. See Jaeger Dec., ¶¶ 14-15. Even once forced into "compliance," most either were unable (or unwilling) to produce payphone call reports, or had no adequate substantiation for the call reports they did produce. *Id.*, ¶ 10. See generally WorldCom Comments at 5 ("[M]any SBRs did not comply with [the First Reconsideration Order] requirements"). While the FCC's threat of imposing severe penalties on non-complying SBRs may have some deterrent effect, the incentives under the new rule have not changed sufficiently to ensure that all

the hundreds of SBRs who failed to comply with the old SBR-pays rule would willingly comply with another SBR-pays-by-default rule.

1. Litigation Is The PSPs' Only Weapon

It is important to recognize that PSPs have no alternatives, short of litigation or reliance on FCC prosecution, for limiting their losses due to SBRs' noncompliance. First, PSPs have no ability to cut off service to nonpaying SBRs APCC Comments at 3, 8 Second, PSPs do not contract with SBRs for allowing use of their payphones and consequently have no opportunity to demand information needed to ensure that the reseller has a valid billing address, good credit, etc. Third, PSPs have no ability to protect themselves from SBRs who are at risk of bankruptcy or who default on their payments, by demanding up-front deposits, surety bonds, and the like. APCC Reply Comments at 15 Fourth, because PSPs currently must await a quarterly billing cycle which itself is a full quarter in arrears, PSPs are unable to obtain early warnings, such as slow pay, when a SBR is approaching financial disruption *Id*

2. Wide-scale Litigation Against Small SBRs Is Simply Impractical

Litigation against resellers who fail to qualify their tracking systems by securing a system audit would be quite expensive and would not be economical except in the case of the largest SBRs.⁷ To warrant the expense of filing and prosecuting a complaint, a target SBR must both (1) owe substantial DAC and (2) have the financial resources to pay their DAC obligation. Litigation over payphone compensation, even at the FCC,

⁷ The overwhelming collection problems experienced by PSPs under the old SBR-pays rule were described in detail in APCC's comments and reply comments in this proceeding. See Comments of APCC, filed June 23, 2003, at 5-11 and Exh. 2; Reply Comments of APCC, filed July 3, 2003, at 19-27 and Exh 1.

generally costs at least \$100,000. Therefore, instituting a collection suit against a SBR who owes less than that amount is rarely worth considering. Cost efficiency in pursuing SBRs before the Commission has been particularly important to claimant PSPs because the Commission's processes do not provide for recovery of attorneys' fees or costs. Hubbard Dec., ¶ 6

Most SBRs will owe less than \$100,000 in compensation, and consequently litigation against them cannot be cost-justified, even by large aggregators such as APCC Services, Inc. APCC Services has estimated that the roughly 300,000 payphones it represents average about 19 compensated SBR calls per payphone per month. *See* Jaeger Dec., Att. B. At \$.24 per call, the average annual compensation payment incurred by each of 1,100 SBRs would be about \$15,000.00. (19 calls/mo X 12 mo. X \$.24 x 300,000 payphones = \$16,416,000 \$16,416,000 ÷ 1,100 SBRs = \$14,923.64) Even if APCC Services sued each reseller for the full two years worth of payments allowed by the statute of limitations (*see* 47 U.S.C. §415) the average compensation sued for would be only \$30,000.00, well under the \$100,000 threshold ⁸

Even above the \$100,000 level, collection proceedings often will not be worth the cost because recovery is so uncertain. Only about one in five of the complaints that APCC Services has filed to date have resulted (or are expected to result) in the collection of DAC. Hubbard Dec., ¶6. And in those cases where recovery has been obtained, the amounts ultimately recovered often do not approach the amount that APCC believes

⁸ As noted in the Declaration of Ruth Jaeger, for the fourth quarter of 1999 APCC billed 1,175 carriers and collected from only 89. Jaeger Dec., ¶ 15. Thus, roughly 1,100 carriers did not pay. This number appears to be a reasonable estimate of the total number of SBRs, given that Qwest alone carries traffic for 355 SBRs. Qwest Comments at 8.

was owed. For example, SBRs may go bankrupt after judgment, or may evade compliance with payment agreements. Even when PSPs reached agreements with SBRs for specific compensation payment schedule to settle past liability, most of the SBRs failed to adhere to their agreements without further threats or litigation. *Id.*, ¶ 11.

For all these reasons, trying to collect compensation from SBRs is almost impossibly difficult, expensive, and burdensome for PSPs. The lion's share of the conservatively estimated \$16 million owed annually to APCC Services by SBRs (which translates to about \$100 million for the industry as a whole) would be clearly uncollectible. And for PSPs represented by smaller aggregators, the prospect for recovery through litigation is far worse.

D. The Annual System Audit Must Be A True “Pre-Condition” Of Payment

For the reasons stated above, a SBR-pays-by-default compensation plan would almost certainly result in large, unrecoverable compensation losses from SBR failures to comply with their payment responsibilities. A large portion of these losses can be averted if the Commission clarifies or modifies its rule to make clear that the Intermediate Carrier is responsible for paying compensation if a Completing Carrier has not submitted a System Audit Report in a timely manner.

Such an Intermediate-Carrier-pays-by-default rule would fairly address the issue of responsibility for payment for SBR calls. SBRs would be treated fairly because only those SBRs that are able and willing to bear the costs of establishing a tracking system would be required to incur those costs. SBRs for whom a tracking system is not economical would be able to legally avoid such costs far more easily than under a SBR-pays-by-default rule. SBRs would retain the opportunity that is available under the latter rule, whereby a SBR could avoid establishing a tracking/payment system by

securing the agreement of all PSPs to an alternative payment arrangement. In addition, however, the SBR could “opt out” of the compensation system by taking no action and simply allowing its Intermediate Carrier to make the direct payments and to recover those payments and associated administrative costs from the SBR.

Further, this plan addresses one of the main arguments that SBRs have made – that they were treated unfairly by Intermediate Carriers. The fact that the SBR can opt into direct payment, without any other party’s consent, by going through the audit process acts as an effective check on abuse of SBRs and unreasonable or discriminatory practices by Intermediate Carriers.”

Intermediate Carriers would be treated fairly because they would be free to recover their payments from SBRs who do not opt for direct payments and would not be required to determine whether SBRs have completed calls.

Most significantly, PSPs would be fairly compensated for “each and every . . . call,” because they would have reasonable assurance of being compensated even if the SBR completing the calls does nothing to comply with the compensation rules.

Suggested amendments to clarify the Commission’s intent to make Intermediate Carriers the default payers are attached to this Petition as Attachment 1.

⁹ In any event, the FCC has repeatedly found that the interexchange service market is highly competitive, and that interexchange carriers generally lack the ability to engage in sustained unreasonable or abusive conduct *vis-à-vis* competitors and/or customers. See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730, 20742-47 (1996)

E. A Default-to-Intermediate-Carrier Rule Is Consistent With The Statute And Case Law

A rule that brings PSPs closer to full compensation by making Intermediate Carriers the “default” payers is fully consistent with the statute and applicable case law.

Concerns that Intermediate Carriers would be inappropriately saddled with compensation obligations that “properly” belong to the SBR are completely unfounded. Since Intermediate Carriers are able to pass through their compensation payments, plus administrative costs, to their customers, Intermediate Carriers can recover their compensation payments from SBRs and SBRs are in no way relieved of the ultimate responsibility for paying compensation. The SBR ultimately pays compensation for the calls it handles in any event, whether by direct payment or by paying a surcharge to the Intermediate Carrier.

To the extent that the *Order* ruled otherwise, it is based on unsound reasoning. In the *Fifth Reconsideration Order*, the Commission did find that it would be inequitable to deprive IXC of compensation refunds to which they were otherwise entitled, in order to mitigate underrecovery by PSPs, where the IXC seeking refunds were not the cause of the underrecovery. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 (2002), ¶¶ 82 (*cited in Order*, ¶ 31 n.83), 83. The *Fifth Reconsideration Order* precedent, however, in no way hinders the Commission from requiring Intermediate Carriers to pay compensation directly as the “default” payer for calls carried by those Intermediate Carriers.

First, in the *Fifth Reconsideration Order* the Commission was not being asked to amend its rules governing prospective compensation obligations. Rather, the Commission was being asked to relieve PSPs from retroactive application of a

compensation rule already adopted. Thus, in the *Fifth Reconsideration Order*, compensation obligations had already been allocated by rule and the Commission found they could not equitably or legally be reassigned retroactively. Here, by contrast, the Commission is seeking to determine prospectively the appropriate rule that should govern the allocation of compensation obligations. In such a prospective rulemaking context, it goes without saying, the Commission has far more discretion.¹⁰ For example, IXCs are routinely permitted to set prospective rates to recover from some of their customers “bad debt” associated with other, non-paying customers. See, e.g., *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962, 12992 (2003).

Second, unlike the carriers in the *Fifth Reconsideration Order*, who had no known connection to the carriers that failed to pay their compensation obligations, an Intermediate Carrier is directly implicated in the calls it carries for its SBR customers. The Intermediate Carrier presumably has the same opportunity to make a profit on toll-

¹⁰ See *American Trucking Association v. Atchison, Topeka and Santa Fe Rwy. Co.*, 387 U.S. 397, 416 (1967). (“Regulatory agencies do not establish rules of conduct to last forever They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday”). Thus, for example, the Commission is not bound to allocate compensation obligations to SBRs merely because it allegedly found they are the “primary economic beneficiaries” of calls made from SBR platforms. Cf. *Order*, ¶ 31 n.82. Since the “primary economic beneficiary” principle – assuming it is even relevant – was adopted in a rulemaking, not mandated by statute, the Commission has discretion to reconsider or make exception to that principle. Indeed, the Commission has already done so. In the *First Reconsideration Order*, the Commission found that switchless resellers should not be given direct payment responsibility, even though they are certainly “primary economic beneficiaries” to the same extent as, if not more so than, SBRs. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, 21277 ¶ 92 (1996).

free calls that it terminates to a SBR platform as it does on any other toll-free call.¹¹ To make an Intermediate Carrier the default payer for calls that it actually carries is quite different from making a carrier the responsible payer for calls that it doesn't handle at all. See *American Trucking Association v. Atchison, Topeka and Santa Fe Rwy. Co.*, 387 U.S. 397, 416 (1967)

Last, but not least, the Intermediate Carrier can recover its compensation payment from the SBR. This is a crucial distinction between the situation in the *Fifth Reconsideration Order* and the instant situation. In the *Fifth Reconsideration Order*, the carrier whose recovery would be reduced could not recoup that loss from the carrier that caused the reduction. In this proceeding, the Commission has specifically ruled that Intermediate Carriers can recover their costs from SBRs. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Order on Reconsideration, 16 FCC Rcd 8098 (2001).

For similar reasons, *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) ("*IPTA*"), does not prevent the Commission from allocating default payment responsibility to Intermediate Carriers. In *IPTA*, the court rejected the Commission's attempt to allocate flat-rate compensation payments for an interim period, on the basis of overall market share, to those carriers with more than \$100 million annual toll revenue. In *IPTA*, the carriers to whom payment responsibility had been allocated had no relation to, and no way of recovering costs imposed on them

¹¹ It should be clearly understood that the toll-free services provided to SBRs are not necessarily different from those provided to other customers. In fact, an Intermediate Carrier may not always even be aware that a customer is a SBR, unless it has specifically checked for purposes of payphone compensation.

because of calls carried by, the exempted carriers. The court did *not* hold that the Commission may not “lawfully ‘require one company to bear another one’s expenses’” (*Order*, ¶ 31 n.82), where the carrier initially bearing the costs may recover its costs from the carrier whose expense it is bearing. Indeed, the Commission’s entire inter-carrier compensation scheme (*e g* , access charges, meet point billing, reciprocal compensation) all depend on one carrier temporarily bearing costs for another carrier’s customers, and then recovering those costs from the carrier on whose behalf they were incurred. Under the logic in the *Order*, it would be impossible to have carriers interconnected to each other since no carrier would ever incur costs on behalf of another. Thus, the *IPTA* court was concerned that some carriers were being totally exempted from participating in the FCC’s compensation scheme. Under a default-to-Intermediate Carrier plan, however, no carrier would be exempted from compensation – all would pay their share either directly or indirectly.¹²

Furthermore, any concerns about “overcompensation” or payment for uncompleted calls should not prevent the Commission from improving its rule by adopting a default-to-Intermediate Carrier plan. Under this approach, it would be entirely the SBR’s choice whether to shoulder direct payment responsibilities or allow those responsibilities to default to the Intermediate Carrier. Therefore, the SBR would have full control and ability to prevent any overcompensation or uncompleted call

¹² The *IPTA* court also held that “the FCC did not justify why it based its interim plan on total toll revenues” because it failed to establish a nexus between a carrier’s total toll revenues and the number of payphone calls carried. *IPTA*, 117 F.3d at 565. Here, by contrast, there *is* a clear nexus – in fact, an identity – between the payphone calls carried by an Intermediate Carrier and the compensation payments for which it would be responsible.

payments that might result from shifting payment responsibility to the Intermediate Carrier

In any event, Section 276 clearly states a Congressional judgment that the most important objective is to ensure that *PSPs* are fairly compensated for *every* completed call. There has to be some margin for error, and the FCC has elsewhere found overcompensation preferable to undercompensation. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2571, 2608-09 (1999) (finding that the compensation rate should be set to recover the costs of a marginal payphone location even though such a rate would increase profits at high-volume locations). Even if meeting the statutory objective results in some “overcompensation” by including some uncompleted calls, that is an acceptable outcome.¹³

F. The Rules Should Ensure Continuity Of Payment If A SBR Fails To Maintain Its Tracking And Payment System

The rules should also amend its rules as shown in Attachment 1, to ensure continuity of payment in the event that a SBR exits the industry or fails to maintain its tracking and payment system. Experience under the pre-November 23, 2001 rules demonstrates that there is no valid basis for the Commission to presume that SBRs that do create call tracking and payment systems will be able to maintain them over time. The record is clear that SBRs frequently exit the market or fail to maintain payment

¹³ In fact, as has been repeatedly demonstrated in this proceeding, the problem in every compensation period has been, not *overcompensation*, but gross *undercompensation* of PSPs.

systems. For example, of the 109 small SBRs and IXC's that paid some compensation to PSPs during the period from October 1, 1997 through September 30, 2001, only nine paid compensation for every quarter of that period. Further, even for those SBRs that did make some sort of payment every quarter, their payment levels often fluctuated in unexplainable ways that cast serious doubt on the integrity of the SBR's call tracking system. See APCC Ex Parte, "Certification and Audit Requirements," filed September 22, 2003, at 3.

To ensure that compensation obligations do not remain with the SBR if it fails to maintain the integrity of its compensation system, the SBR's assumption of payment responsibility should be valid only for the four quarters immediately following the SBR's submission of a system audit report. For example, if the SBR submits a certification on October 15, 2003, then the SBR is responsible for paying compensation on calls routed to its platforms during all four quarters of 2004. If a SBR ceases to be capable of paying compensation, it must so notify the Commission, in which case the compensation obligation reverts to the Intermediate Carrier beginning with the first quarter that begins 30 days or more after the notification. If the SBR fails to submit a timely certification, then the Intermediate Carrier is responsible for paying compensation for every quarter until the quarter that begins 30 days after a further certification. See Attachment 1.

II. ADDITIONAL ISSUES

The Commission should reconsider or clarify a number of other aspects of the *Order*, in addition to the overarching default-payer issue discussed above.

A. Verification Data Must Be Kept For At Least 27 Months

The new SBR-pays rule states that Intermediate and Completing Carriers need only preserve verification data for 18 months after the “close of the quarter.” *See Order*, App. C., amending 47 CFR § 64.1310(g). The *Order* states that the required period for maintaining data was set at 18 months to correspond with the 18-month deadline for submitting an initial claim for payment. That deadline, however, does not adequately serve the Commission’s purpose to “ensure that PSPs have access to necessary data in the event of disputes” with Completing Carriers. *Order*, ¶ 45. Disputes over the number of calls subject to compensation do not normally arise until *after* a PSP has submitted an initial claim for payment, because the carrier does not report call volume to the PSP until it proffers payment. Therefore, the time limit for submitting initial claims does not provide an appropriate guideline for setting the duration of the period for which verification data must be maintained.

For example, systematic errors or abuses resulting in underpayments may not become evident until they have persisted for several payment cycles. At the point when they are discovered, under the Commission’s rule, verification data may no longer be available for a substantial portion of the unpaid calls. In a not-atypical scenario, a PSP may notice an apparent underpayment in a given payment cycle, begin to address it with the carrier, and then discover that the problems actually began several cycles earlier. Under the two-year statute of limitations for bringing collection actions under the Communications Act (47 U.S.C. § 415), the PSP has a legal right to institute litigation up to 27 months after the close of the quarter in which the unpaid calls occurred. (The limitations period ordinarily runs from the time that payment is due, which is typically three months after the close of the quarter.) Under the two-year statute, a PSP that files a complaint on June 1, 2004, can seek relief for underpayments made on July 1, 2002, for

calls placed during the first quarter of 2002, as well as under-payments for seven subsequent quarters up to the fourth quarter of 2003 (for which payment is due April 1, 2004). Under the Commission's 18-month rule, however, verification data would be available on June 1, 2004 for only five of the eight quarters covered by the complaint. Data for the first three quarters of 2002 would have been destroyed because the complaint was filed more than 18 months after the close of the quarter. To ensure that call detail remains available throughout the limitations period, the Commission should require verification data to be kept for at least 27 months after the close of the quarter.

Therefore, the Commission should amend Section 64.1310(g) to provide that "[e]ach . . . Carrier . . . must maintain verification data . . . for at least 27 months after the close of the quarter."

B. Carriers Must Be Required To Report Uncompleted Calls

Under the Commission's modified SBR-pays rule, a Completing Carrier is required to report call volumes only for completed calls, not for uncompleted calls. *See Order*, App. C, amending 47 CFR § 64.1310(a)(4)(ii). Further, while the rules require carriers to maintain "verification data" supporting the call volume reports, the only call detail that carriers are explicitly required to retain is call detail on the calls actually reported, *i.e.*, completed calls. *Id.*, § 1310(g). In attempting to comply with this rule, of course, a carrier would have to make its own determination as to which calls are "completed" and thus subject to being reported. As a result, the carrier might not consider itself obligated to report call volumes or maintain call detail for any calls that it regards as uncompleted, even though its judgment may be in error.

It is however, precisely those calls that are regarded by the carrier as uncompleted that are most likely to become the subject of a dispute. A PSP ordinarily is

not going to dispute the carrier's disposition of calls that the carrier records as completed, because the PSP has been paid for those calls. Rather, the PSP will contend that calls recorded as "uncompleted" were in fact completed. Under the Commission's rule, a PSP that disputes a carrier's count of completed calls may find that there is no available call detail to verify any of the "uncompleted" calls in dispute. Without such data, there is no way to definitely establish the true number of completed calls or whether the Completing Carrier has underreported completed calls.

In light of the Commission's purpose to ensure that PSPs have "access to necessary data in the event of disputes" (*Order*, ¶ 45), it is unreasonable to require a carrier to maintain data only on undisputed calls, while allowing the carrier to destroy data on the very calls that would be subject to dispute. The requirement that Completing Carriers preserve data to help resolve disputes is thus fatally weakened if carriers do not have to preserve data on uncompleted calls. To address this problem, the Commission should amend Section 64.1310(a)(4)(ii) to make clear that Completing Carriers must record call detail and report call volumes for calls that were attempted but not completed, as well as for completed calls.

C. Call Duration Data Must Be Reported

Under the Commission's modified SBR-Pays rules, the verification data provision does not explicitly require the preservation of call duration data (and the end time as well as the beginning time for the call) *See Order*, App. C, amending 47 CFR § 64.1310(g). This is key information for, e.g., assessing whether calls are being correctly reported as uncompleted. As noted above, "uncompleted" calls tend to be a major focus of compensation disputes. The duration of such calls provides an important indication of possible systematic error in tracking completed calls.

To address this problem, the Commission should clarify Section 64.1310(g) by revising the second sentence to state “This data must include, but is not limited to, the beginning and ending time, and date and duration for that each call identified in subparagraph (a)(4) and subparagraph (c)~~was made~~. This data must be provided to the payphone service provider upon request.”

D. There Must Be A Uniform Reporting Format

The rule does not explicitly require a uniform format for reports to PSPs. Currently, PSPs must deal with many different and inconsistent formats in the compensation reports prepared by carriers, many of whom do not use industry clearinghouses to process their payments. This problem will be particularly acute if the Commission retains the current version of the SBR-pays rule because the number of payers will increase many-fold, and because those SBRs that actually paid compensation under the old rules frequently used inconsistent formats. *See* Jaeger Dec. ¶ 10.

To address this problem, the Commission should amend Section 64.1310(g) by adding the following sentence: “In reporting data, carriers must adhere to standard industry formats wherever applicable.”

E. The Order Should Explicitly Define When Calls Are “Completed” To Carriers

In prior orders, the Commission has defined “completed call” for payphone compensation purposes as “a call that is answered by the called party.” *See, e.g. First Payphone Order*, 11 FCC Rcd at 20573-74. There have been numerous disputes between PSPs and IXC’s about the application of this definition to the circumstance where a customer calls a carrier’s toll-free number to obtain information from the customer

services department or to make a transaction without intending to or attempting to place a further call from the carrier's platform to an end user. Some IXCs insist on treating these types of calls as uncompleted, even though it is clear that the "called party" is the carrier itself.

To resolve this problem, the Commission should clarify that, when a customer places a call to the carrier itself, or to the carrier's platform, to conduct any transaction other than to place another call, the "called party" is the carrier itself. The Commission should further clarify that the fact that a call to a carrier may be answered by some form of automated processor, rather than by a human representative, does not preclude the call from being treated as "completed" to the called party if the caller does not attempt to use the carrier's platform to place a further call.

F. The Commission Should Clarify The Payment Obligations Of LECs

The Commission should take this opportunity to clarify the payment obligations of LECs. Some LECs only compensate PSPs through bill credits, which only apply to their own local service subscribers. Apparently, these LECs are not compensating PSPs if a PSP is not served by the LEC as LEC but the PSP nonetheless originates calls handled by the LEC as IXC.

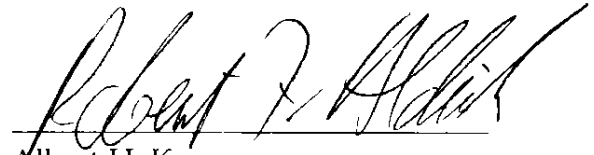
The Commission should clarify that, unless LECs and PSPs agree otherwise, LECs are required to pay compensation when they complete local toll-free or access code calls originating from payphones, or when they act as an IXC to complete toll-free or access code calls originating from payphones, whether the payphones are located inside or outside the LEC's local service territory and whether or not the LEC is the LEC serving the payphone.

CONCLUSION

In accordance with the foregoing petition, the Commission should reconsider, modify, and/or clarify the compensation rule adopted in its *Order*.

Dated: December 8, 2003

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

Albert H. Kramer

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ATTACHMENT 1

**APCC's PROPOSED AMENDMENTS TO THE
COMMISSION'S FINAL COMPENSATION RULES**

**APCC's PROPOSED AMENDMENTS TO THE
COMMISSION'S FINAL COMPENSATION RULES**

Part 64 of the Code of Federal Regulations is amended as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1 The authority for part 64 remains unchanged.

2 Section 64.1310 is amended by revising paragraphs (a)(4) and (g) and adding a new paragraph (h), to read as follows:

§ 64.1310 Payphone compensation procedures.

(a) Unless the payphone service provider agrees to other compensation arrangements, each Completing Carrier identified in section 64.1300(a) shall compensate the payphone service provider as follows

(4) At the conclusion of each quarter, the Completing Carrier shall submit to the payphone service provider, in computer readable format, a report on that quarter that includes:

(i) A list of the toll-free and access numbers dialed from each of that payphone service provider's payphones and the ANI for each payphone;

(ii) The volume of calls for each number identified in subparagraph (a)(4)(A) that were completed by the Completing Carrier and the volume of calls for each number that were attempted but not completed;

(iii) The name, address, and phone number of the person or persons responsible for handling the Completing Carrier's payphone compensation; and

(iv) The carrier identification code ("CIC") of all facilities-based long distance carriers that routed calls to the Completing Carrier, categorized according to the list of toll-free and access code numbers identified in paragraph (a)(4)(i) of this section

(g) Each Completing Carrier and each Intermediate Carrier must maintain verification data to support the quarterly reports submitted pursuant to paragraphs (a)(4) and (c) of this section for ~~18~~²⁷ months after the close of that quarter. This data must include, but is not limited to, the beginning and ending time, and date and duration for that each call identified in paragraphs (a)(4) and (c) of this section was made. This data must be provided to the payphone service provider upon request. In reporting data, carriers must adhere to standard industry formats wherever applicable.

4 Section 64.1320 is amended by revising paragraphs (a), (b), (f), and (g) to
read as follows

§ 64.1320 Payphone Call Tracking System Audits.

(a) ~~As a precondition to tendering payment pursuant to section 64.1310(a), all~~
~~Completing Carriers~~ All carriers that compensate payphone service providers must
 undergo a system audit of their section 64.1310(a)(1) tracking system by an independent
 third party auditor whose responsibility shall be, using audit methods approved by the
 American Institute for Certified Public Accountants, to determine whether the call
 tracking system accurately tracks payphone calls to completion.

(b) Every First Facilities-Based Carrier and as a precondition to tendering payment pursuant to section 64.1310(a), every other carrier -- By the effective date of these rules, each ~~Completing Carrier in paragraph (a) of this section~~ must file ~~an~~ a timely audit report from the auditor (the "System Audit Report") regarding the ~~Completing~~ Carrier's compliance with section 64.1310(a)(1) as of the date of the audit with the Commission's Secretary in CC Docket No. 96-128 and with each payphone service

provider for which it completes calls and with each facilities-based long distance carrier from which it receives payphone calls.

(f) One year after the filing of the System Audit Report, and annually thereafter, the Completing Carrier shall engage an independent third-party auditor to: (1) verify that no material changes have occurred concerning the Completing Carrier's compliance with the criteria of the prior year's System Audit Report; or (2) if a material change has occurred concerning the Completing Carrier's compliance with the prior year's System Audit Report, verify that the material changes do not affect compliance with the audit criteria set forth in paragraph (c) of this section. The Completing Carrier must fully disclose any material changes concerning its call tracking system in its representation to the auditor. Every ~~the~~ Completing Carrier that is not a First Facilities-Based Carrier shall annually file and provide, ~~copies of all System Audit Reports~~ pursuant to the procedures set forth in paragraph (b) of this section, copies of an Audit Renewal Report that describes the findings of the independent auditor. If a Completing Carrier other than a First Facilities-Based Carrier fails to file an Audit Renewal Report or files an Audit Renewal Report that indicates that the Completing Carrier no longer complies with paragraph (c) of this section, then an Intermediate Carrier shall assume the obligations of the Completing Carrier as provided by section 1310(h) until the first quarter that begins at least 30 days after the Completing Carrier files a new System Audit Report.

(g) Subject to protections safeguarding the auditor's and the Completing Carrier's confidential and proprietary information, the Completing Carrier shall provide, upon request, to the payphone service provider for inspection any documents, including working papers, underlying the System Audit Report and Audit Renewal Reports

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2003, copies of the foregoing Petition of the American Public Communications Council for Clarification or Partial Reconsideration were served on the parties (except those marked with an asterisk) via first-class mail. Copies were served on the parties marked with an asterisk (*) via hand-delivery on December 8, 2003.

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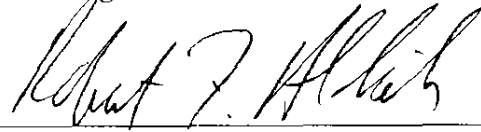
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Robert F Aldrich

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Implementation of the Pay Telephone)

CC Docket No. 96-128

Reclassification and Compensation)

Provisions of the Telecommunications)

File No NSD-L-99-34

Act of 1996)

PETITION OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
FOR CLARIFICATION OR PARTIAL RECONSIDERATION

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December 8, 2003

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